Supreme Court of the United States

October Term, 1920

No.

Original

In the Matter

of

The Petition of HUSSEIN LUTFI BEY, Master of the Turkish Government steamship "GUL DJEMALE", for Writ of Prohibition and/or a Writ of Mandamus

against

The Hon. JOHN C. KNOX, United States District Judge for the Southern District of New York, and the other Judges and officers of the said United States District Court for the Southern District of New York.

MEMORANDUM IN SUPPORT OF MOTION AND PETITION FOR A WRIT OF PROHIBITION AND/OR FOR A WRIT OF MANDAMUS.

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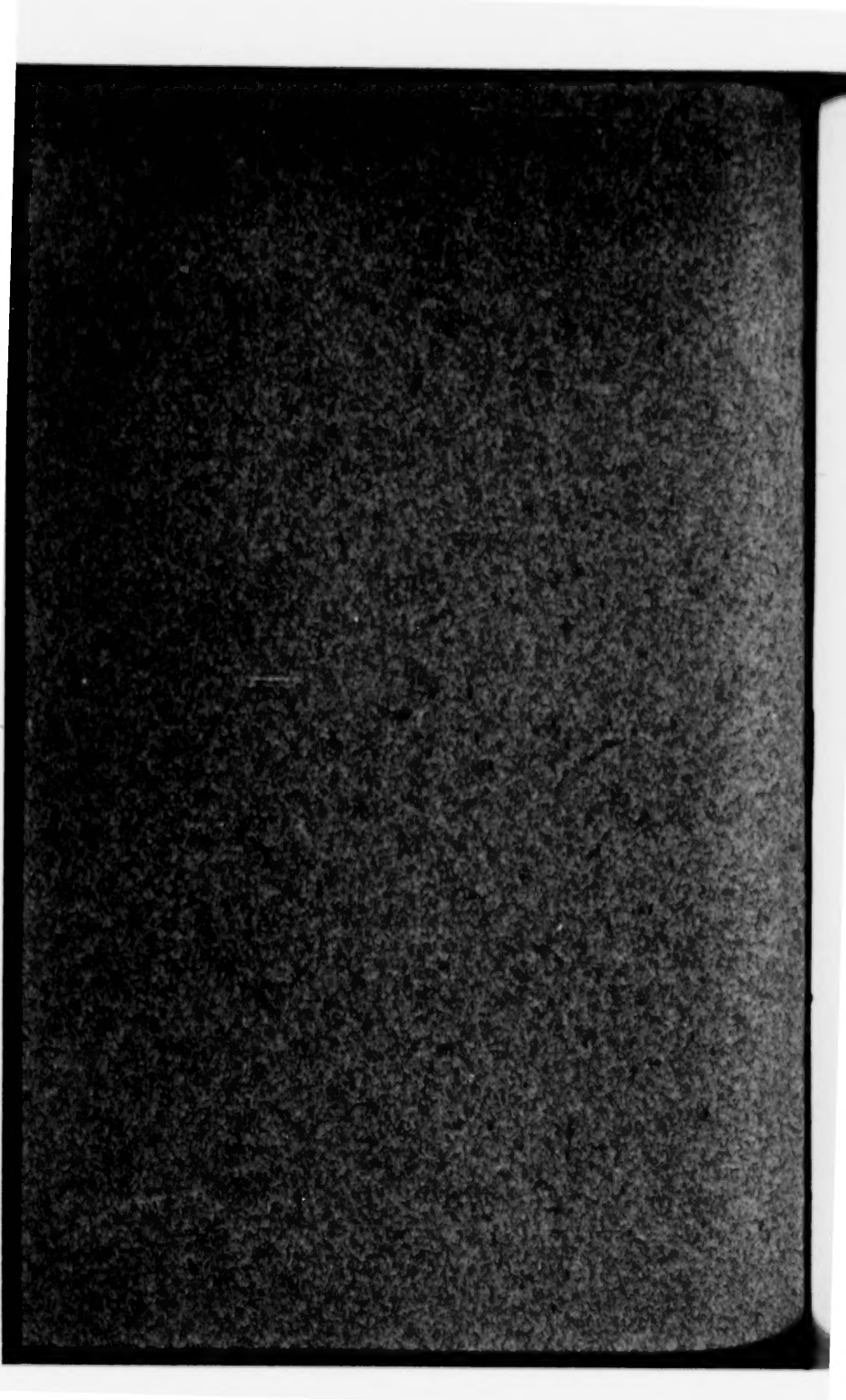

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER *of* The Petition of HUSSEIN LUTFI BEY, Master of the Turkish Government steamship *Gul Djemal*, for a Writ of Prohibition and/or a Writ of Mandamus *against* HON. JOHN C. KNOX, United States District Judge for the Southern District of New York, and the other judges and officers of the said United States District Court for the Southern District of New York.	October Term, 1920 No. Original

MEMORANDUM IN SUPPORT OF MOTION FOR PERMISSION TO FILE A PETITION FOR WRIT OF PROHIBITION AND/OR FOR WRIT OF MANDAMUS.

In making this second application for a writ of prohibition and/or for a writ of mandamus against the Honorable John C. Knox by reason of the decision made

by him to hold the Turkish Government steamship *Gul Djemal* under the libels of *Mount Royal Steamship Company, Ltd.*, and other libelants, now pending in the United States District Court for the Southern District of New York, the counsel for the motion and the petitioner desire to call to the Court's attention the fact *that the present motion involves a new procedure and is based on an entirely new set of papers.*

Of necessity the papers which were before the Court on the previous application made January 14, 1921, and denied January 17, 1921, are also printed here in order that the Court may have before them everything relevant to the relief sought.

As the Court will, perhaps, remember, the denial of the previous motion for a writ of prohibition and/or mandamus on behalf of the *Gul Djemal* was made by this Court on January 17, 1921, at which time the Court handed down a decision in the case of *In re Muir, as master of the British steamship Gleneden.*

In the case of *In re Muir* and in the previous application in behalf of the *Gul Djemal,* the interested Ambassadors sought to appear here as *amici curiae,* although the Ambassador had also appeared directly in the Court below, in the case of the *Gul Djemal.*

On the present application, however, the Ambassador is not intervening.

I. THE PROCEDURE FOLLOWED BELOW.

After the refusal of the previous application in the *Gul Djemal* and after the decision of *In re Muir*, a motion was made on behalf of the master of the *Gul Djemal* for leave to file a special claim to the vessel, accompanied by a special plea in abatement and an exception to the issuance of the writ against the steamer.

An order was entered by Judge Knox granting this motion, and the special claim, the plea in abatement, the exception and the order allowing it to be filed, are annexed to this petition, marked Schedules "S" and "T" thereof.

By the provisions of Judge Knox's order, Schedule "T," seven days were allowed within which the libelant could except, demur or otherwise plead to the special plea in abatement.

The libelant elected to file an exception—*i.e.*, a demurrer—to the special plea in abatement. This exception is annexed to this petition as Schedule "U" thereof.

A *formal motion* was made on behalf of the master of the *Gul Djemal*, based on the said special plea in abatement and the exception filed thereto by the libelant, *for the release of the vessel.*

On February 10th argument on this motion was had and the motion was denied by Judge Knox, who stated that he would adhere to his previous ruling, *i.e.*, that breach of diplomatic relations cut off rights to immunity.

The formal decision is embodied in the order entered February 17, 1921, which is marked Schedule "W."

Thus there is now raised by the proceedings in the District Court, which were wholly regular in their nature, a clean cut question of law as to whether the fact that the *Gul Djemal* was, and is, owned by, and in the possession of the Turkish Government, which is at peace with the United States, should not entitle her to the usual immunity of a vessel in such a position, in spite of the fact that the Turkish Government has broken off diplomatic relations with the United States Government.

The position that Judge Knox has taken, as shown by his two opinions, and as stated orally by him on the argument of the motion to release the vessel made February 10th, 1921, *is that between peace and war there is a twilight zone, indicated by a breach of diplomatic relations, and that such a breach of diplomatic relations, although the Nations involved are still at peace, cuts off certain rights and privileges, which would exist if such a breach of diplomatic relations had not occurred. Opinions, Schedules "M" and "Q", pages 65, 81.*

Neither Judge Knox nor counsel on either side have been able to find any judicial authority for this position, either in the decisions of this Court or in any other Court. The question, therefore, is raised in a clean cut manner in the present application by the master of the vessel who is the regular representative of the vessel and the owner and is now up for the first time in this Court.

II. THE SOLE QUESTION INVOLVED, THEREFORE, IS WHAT EFFECT, IF ANY, A BREACH OF DIPLOMATIC RELATIONS HAS ON THE PROPERTY RIGHTS AND IMMUNITIES OF THE RESPECTIVE GOVERNMENTS INVOLVED.

It would seem to be quite clear that, if the *Gul Djemal* were a Turkish war vessel, she could not be considered subject to the jurisdiction of our Courts, irrespective of the breach of diplomatic relations.

It is contended on behalf of the *Gul Djemal* that, although she is used as a merchant vessel, the fact that she is owned by, and in the possession of, and operated by the Turkish Government, makes her a public vessel so far as the jurisdiction of our Courts are concerned, just as if she were a war vessel.

Indeed, it appears to counsel for the *Gul Djemal* a dangerous doctrine to hold that a breach of diplomatic relations wipes out the rights of the other Government involved, so that the Courts do not have to observe and recognize the ordinary international immunities and privileges.

Such a state of affairs as a breach of diplomatic relations ought, in fact, to require that the Court should act with more than usual circumspection, in order to avoid precipitating Nations which have broken off diplomatic relations, into actual warfare, as might well be the case, when relations are strained, if the Courts of one Nation should, in contravention of the usual rules of international courtesy, seize vessels of the other Government, which happens to be in its ports. Such an act might very

well be considered as *casus belli* by a Nation which was strong enough to take objection.

On principle the petitioner has, it is submitted, the right of the controversy.

III. Owing to the State Department's attitude no other procedure was possible than that which was followed below.

The practice here was quite regular—a special claim and plea in abatement by the master as bailee and custodian of the vessel.

The alternative suggestion made by this Court in the case of *In re Muir* as to a method of procedure by which the State Department might intervene in cases where immunity was claimed, is shown to be impossible in this case.

On January 25th, 1921, the Spanish Ambassador, representing Turkish interests, referring to previous correspondence between himself and the State Department, wrote to the State Department, assuring them on behalf of his Government that the steamship *Gul Djemal* was the property of the Turkish Government, and stating that he was requested to do everything possible to obtain her release from her present arrest, on the ground that she was the property of the Turkish Government and manned, operated by and in the possession of the Turkish Government.

The Ambassador suggested that the Attorney General of the United States, or some other officer acting under his direction, on instruction by the State Department, should make an appropriate suggestion of the fact that the vessel was the property of the Turkish Government, and that she was immune from seizure in the United States District Courts, in order that she might be allowed to proceed from New York to Constantinople with despatch.

The Ambassador also pointed out the fact that, owing to her seizure and detention, the *Gul Djemal* had been lying for upwards of three months in the North River at a great expense to the Turkish Government. *Letter from the Spanish Ambassador to the State Department, marked Schedule "X".*

In answer to that letter, the Acting Secretary of State wrote, under date of February 14th, refusing to accede to the Ambassador's request, *not on the ground that there had been a breach of diplomatic relations between Turkey and the United States, but solely on the ground of a departmental practice.*

The Acting Secretary of State said—

> "The Department has made it a practice carefully to refrain from taking any action which might constitute an interference by the authorities of this Government in private litigation, even though such litigation may in some way involve merchant vessels owned by a foreign Government." *Letter from the Department of State to the Spanish Ambassador, February 14, 1921, marked Schedule "Y."*

These letters are printed in this application for two reasons:

1. That this Court might have before it all the correspondence relevant to the application which the petitioner is hereby making, and

2. That this Court might realize that foreign Governments cannot protect their property if they are forced to depend upon our Department of State for assistance to that end.

The only two occasions, since the beginning of the European war, so far as counsel is aware, in which the State Department has ever intervened in any way are the cases of *The Luigi*, 230 Fed. 493 and *The Attualita*, 238 Fed. 909.

In both of those cases the intervention was, as shown by the reports, purely colorless without any request that immunity be granted and, consequently, did not take the parties any further than they would have been without any State Department intervention.

In *The Attualita*, the vessel was held to be not immune and since that time the State Department has avoided any intervention of any kind.

IV. The attitude of the State Department cannot cut off the rights or immunities of another sovereign.

But the attitude of the State Department, *although it may preclude a certain form of procedure*, cannot cut

off the rights of a foreign Government or the immunities of a foreign Government, if the foreign Government wishes to contend for such rights and immunities.

Such rights and immunities can only be cut off by a treaty with the other Nation, by which it is agreed that the immunity shall not exist, or in the case of vessels by an Act of Congress providing that any foreign Government-owned vessels entering our ports for commercial purposes will be deemed in all respects to have the status of privately owned vessels and be subject to all the liabilities of privately owned vessels.

Congress can, of course, exclude foreign vessels from our ports if it wishes to do so and can determine the terms on which they shall come in.

> *Patterson* v. *The Bark Euroda*, 190 U. S. 169.
> Cf. *The Exchange*, 7 Cranch 116, 149.

But until such legislation is passed, the well settled rules of international law prevail because, as Chief Justice Marshall said in *The Exchange*, 7 Cranch 116, the case which is the commencement of all the jurisprudence on this subject, at page 147 (italics ours):

> "It seems, then, to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.
>
> "Without doubt the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employ-

ing force, or by subjecting such vessels to the ordinary tribunals. *But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals,* which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, *ought not, in the opinion of this court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.*"

Thus until the rules are changed by competent authority, there is a kind of international estoppel which prevents our courts from exercising jurisdiction over vessels owned by foreign governments.

V. VARIOUS REASONS WHY A RULE SHOULD BE GRANTED HEREIN.

The petitioner prays that the Court will grant a rule in this case in order that full argument may be had on the important question of law involved, and in order that it may be judicially determined what, if any, effect a breach of diplomatic relations has on the immunity of the governmental property of the other Government involved in the breach.

The situation is a most serious one from the point of view of the Turkish Government and the steamship *Gul*

Djemal because the Turkish Government is under and has been under the very heavy expense of maintaining a crew of upwards of two hundred men on the vessel during all these months of detention and is prevented from the beneficial use of the vessel in earning freight. The value of the vessel for the purpose of earning freight is probably upwards of $1200 a day.

There is another serious consideration.

If the vessel should be held liable under the libel and should have to be put up for sale by the United States Marshal, it is very questionable whether the United States Marshal properly could sell the property of a foreign sovereign, and if he did so, whether the foreign sovereign would be bound by the sale. The foreign sovereign could undoubtedly challenge the title of the purchaser, whenever the vessel got beyond the three-mile limit.

Supposing for example, that the *Gul Djemal*, after she had been purchased at a Marshal's sale, should in the course of her voyagings return to Turkey, it is perfectly clear that the Turkish Government would not recognize the title of the new purchaser and would probably retake the vessel on the ground that it was Turkish Government property which had been improperly disposed of by our Courts.

It is quite true that conceivably Turkey is not in a naval position at the present time to retake the vessel if she was sold by our Courts, but *that does not affect the principle* and if a vessel owned by the British Govern-

ment, or by the Italian Government or by the French Government, were so sold against their protests, undoubtedly those countries would use their naval vessels to retake their property so soon as it left our jurisdiction.

The situation should be approached and considered from the same point of view as if the most favored nation were involved.

The whole matter is so fraught with complications and difficulties and the whole principle, contended for by the libelant and by Judge Knox, is so full of the possibility of serious trouble, if it should be applied in the case of any other than a weak Nation, that counsel for the petitioner earnestly contend that this Court should grant a rule and decide the question on this petition so that it will be finally established,

First, whether a foreign Government owned vessel, though commercially used, is immune from the process of our Courts, until Congress shall have otherwise enacted, and,

Second, whether so long as countries remain at peace, under the present rules of international law, commercial vessels, owned by and in the possession of the respective Governments, are immune from process in each other's Courts, although a breach of diplomatic relations may have occurred.

VI. THERE IS NOT ANY OTHER AVAILABLE REMEDY THAN THAT NOW SOUGHT FROM THIS COURT.

The order of Judge Knox sustaining the exceptions to the plea in abatement and overruling the plea is not a final order and, hence, is not appealable to the Circuit Court of Appeals.

Montgomery v. *Anderson*, 21 How. 386.
Cushing v. *Laird*, 107 U. S. 69.
McLish v. *Roff*, 141 U. S. 661.
Bender v. *Penn. Co.*, 148 U. S. 502.
Hohorst v. *Hamburg American Packet Co.*, 148 U. S. 262.

If it had been a final order it would not have been directly appealable to this Court under Section 238 of the Judicial Code because it does not involve the question *of the jurisdiction of the Court as a Federal Court* because the Court has jurisdiction of the subject matter of the suit.

The only question is the jurisdiction of any Court over the steamship *Gul Djemal* in her present status, and that is a question of liability and not jurisdiction. *The Attualita*, 238 Fed. 909.

It is only questions of the jurisdiction of the Court as a Federal Court that are directly appealable under Section 238.

Louisville Trust Co. v. *Knott*, 191 U. S. 225, 230.
United States v. *Congress Construction Co.*, 222 U. S. 199.
Male v. *Atchison, etc.*, 240 U. S. 97.

It is not possible to apply for a writ of prohibition to the United States Circuit Court of Appeals for the Second Circuit because the Circuit Courts of Appeal are without jurisdiction to issue any great writs except in aid of their appellate jurisdiction.

Muir, as Master of the Gleneden, v. *Chatfield,* 255 Fed. 24 (1918, C. C. A. Second Circuit).

It is not possible to try a case of this kind and at the same time maintain the immunity which it is necessary to maintain in order to preserve the rights of the sovereign. A case cannot be tried without submitting to the jurisdiction of the Court.

The filing of a bond would at once waive immunity.

The Luigi, 230 Fed. 493.

For it is only a sovereign or his representative that can claim sovereign immunity.

The Crimdon, 35 T. L. R. 81, 82.

The relief herein prayed for is, therefore, it is submitted, appropriate and is apparently the only relief procurable.

There is ample precedent for the granting of a writ of prohibition in a case of this kind.

Smith v. *Whitney,* 116 U. S. 167, 173.
In re Rice, 155 U. S. 396, 402.
In re New York, etc. S. S. Co., 155 U. S. 523, 531.

The first reported instance of a writ of prohibition in this Court is, we believe, the case of *United States* v.

Peters, 3 Dallas, 121 (1795), in which the question raised was a question of immunity of an arrested corvette, *The Cassius*, belonging to the French Republic and in which the writ of prohibition was granted.

To the same effect in principle are:

In re Baiz, 135 U. S. 403.
In re Cooper, 138 U. S. 404.
In re Cooper, 143 U. S. 472.
Ex parte Indiana Transportation Co., 244 U. S. 456.

In *In re Cooper*, 143 U. S. 472, Mr. Chief Justice Fuller said, at page 495 (italics ours):

> "The writ thus provided for by section 688 is the common law writ, which lies to a court of admiralty only when that court is acting in excess of, or is taking cognizance of matters not arising within its jurisdiction. *Its office is to prevent an unlawful assumption of jurisdiction,* and not to correct mere errors and irregularities.*"

In *Ex parte Easton*, 95 U. S. 68, 77, Mr. Justice Clifford recognized, in his opinion, the propriety of issuing a writ of prohibition to restrain an abuse of power by an inferior Court, but said at page 77 (italics ours):

> "Application for the writ of prohibition is properly made in such a case, upon the ground that the District Court has transcended its jurisdiction in entertaining the described proceeding * * * Such a writ is issued to forbid a subordinate court to proceed in a cause there depending, *on sugges-*

* It should be noted that this is jurisdiction generally, not merely jurisdiction as a Federal Court

tion that the cognizance thereof belongeth not to the court. F. N. B. 39; 3 Bl. Com. 112; 2 Pars. Ship. 193; 8 Bac. Abr. 206."

What is now sought to be done by Judge Knox is, against the principles of international law, to assume jurisdiction over a Turkish Government vessel in a cause the cognizance whereof, because of such government ownership, belongeth not to his Court.

LAST POINT.

THE RULE PRAYED FOR SHOULD BE GRANTED.

Respectfully submitted,

WILLIAM A. PURRINGTON,
JOHN M. WOOLSEY,
FRANK J. MCCONNELL,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. Original

Ex parte

EXPORTERS OF MANUFACTURERS' PRODUCTS, INC.,

Petitioner.

ON PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION, TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION FOR LEAVE TO FILE PETITION; PETITION AND AFFIDAVITS.

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the Southern District of New York, in which cause your petitioner is the plaintiff-in-error, and that said court may be prohibited and restrained from entering, making or enforcing any order striking out the bill of exceptions filed in said cause and for such other or further alternative or additional writ, order or relief as your petitioner may be entitled to in the premises.

The facts upon which the petitioner asserts its rights to the relief sought are set forth in the petition and supporting affidavits herewith submitted.

The petitioner further prays, if leave to file the petition be granted, that a rule be entered and issued directing the Judges of said Circuit Court of Appeals to show cause before this Court why a writ or writs should not issue in accordance with the prayer of the petition and that all proceedings in said Circuit Court of Appeals be stayed pending the hearing and determination of this application.

HENRY M. WARD,
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522 Fifth Avenue,
New York City.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. Original

Ex parte

EXPORTERS OF MANUFACTURERS' PRODUCTS, INC.,

Petitioner.

On petition for writ of mandamus, and/or writ of prohibition, to the Circuit Court of Appeals for the Second Circuit.

PETITION.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Exporters of Manufacturers' Products, Inc., for its petition, respectfully shows:

I. That your petitioner is a corporation organized under the Laws of the State of New York, having its principal office and place of business within the Southern District of New York.

II. That in the month of January, 1918, your petitioner as plaintiff brought an action at law in the District Court of the United States for the Southern District of New York to recover damages for breach of contract against Butterworth Judson Company, a corporation organized under the Laws

of New Jersey. As appears from the amended pleadings in said action, the plaintiff sues upon a written contract to recover a broker's commission of five cents a pound on some 60,000,000 pounds of picric acid sold by defendant to the Government of France through said government's purchasing agents.

III. That said action came on for trial before the Honorable William B. Sheppard and a jury on October 6th, 1919, and subsequent days; after several adjournments the trial was completed on October 31, 1919, when the court submitted the case to the jury and the jury found a general verdict for the defendant and plaintiff's motion for a new trial was denied. Judgment of dismissal on the merits was entered November 26th, 1919.

IV. That the Honorable William B. Sheppard, who presided at said trial, is the District Judge for the Northern District of Florida, and was holding court in New York by assignment. A few days after the trial he returned to Florida and remained there until after the settlement of the bill of exceptions as herein stated.

V. That your petitioner was advised by its attorney and counsel, Harford T. Marshall, Esq., that reversible error had been committed by the trial judge, both in his rulings upon the admission and rejection of evidence, and in his charge, to all of which rulings exception had been duly taken, and your petitioner thereupon decided to seek a review of such errors in the Circuit Court of Appeals for

the Second Circuit and instructed counsel to sue out a writ of error accordingly.

VI. That under Rule 5 of said District Court as amended on May 8, 1917, it is provided:

> "For the purpose of taking any action which must be taken during the term of court at which final judgment or decree is entered such term of court is extended for ninety days from the date of entry of the final judgment or decree."

VII. That your petitioner, through its counsel, thereupon ordered the transcript of all the proceedings of the trial from the official stenographer. That the same was 860 pages in length, in addition to which were some 29 documentary exhibits offered by plaintiff, covering 98 pages of the printed record, and some 28 documentary exhibits offered by defendant, covering some 88 pages of the record. That in the meantime plaintiff's counsel, Harford T. Marshall, was constantly occupied with professional engagements and unable to give the time required to make a trip to Florida to procure the settlement of the bill of exceptions by Judge Sheppard.

VIII. That your petitioner's said counsel during the period from November 26th, 1919, the date of the entry of judgment, to February 24th, 1920, the date of the expiration of the 90 days' extension of term by Rule 5 of the District Court Rules, informed the attorneys for the defendant, Messrs. Chadbourne, Babbit & Wallace, of 14 Wall Street, New York City, that he intended to sue out a writ of error from the said Circuit Court of Appeals

to review the said judgment; that he was in course of preparing the bill of exceptions, but that he would be unable, owing to the causes of delay above set forth, to have the same completed and ready for settlement within 90 days from the date of judgment and said attorneys prior to the 24th day of February, 1920, agreed orally to extend by stipulation the said period of 90 days mentioned in Rule 5 of said District Court above referred to.

IX. That your petitioner's said counsel, as more fully appears from the affidavits herewith submitted, instructed his clerk to have a written stipulation prepared and signed accordingly, but that said clerk overlooked the same and did not present such stipulation to defendant's attorneys for signature until after the expiration of said period of 90 days, to wit, on March 1st, 1920, on which day a stipulation was presented to said defendant's attorneys, who retained said stipulation over night, amended and rewrote the same, and on March 2nd, 1920, signed the stipulation so amended and delivered the same to said clerk.

X. That said stipulation reads as follows:

> "IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the November Term of the United States District Court for the Southern District of New York be extended to April 6th, 1920, for the purpose of settling and filing the Bill of Exceptions herein. The defendant, however, reserves the right to object, as not noted in time, to any exceptions not noted by the plaintiff within the time specified by stipulation between the

parties entered into upon the trial of this action.

Dated, New York, March 1, 1920.

HARFORD T. MARSHALL,
Attorney for Plaintiff.

CHADBOURNE, BABBIT & WALLACE,
Attorneys for Defendant."

XI. That, as your petitioner is informed by his attorney, during the month of February, 1920, petitioner's said counsel had in mind the rule as set forth by the Circuit Court of Appeals for the Second Circuit upon the technical point of practice involved in its opinion in the case of Blisse v. United States, 263 Fed., 961, January 14th, 1920, in which it is stated at page 966:

> "We see no sufficient reason to hold that the bill cannot be signed by the judge after the term has expired, provided the parties consent, and that such consent may be given after the term has expired,"

and, therefore, in reliance upon the oral agreement *made before the expiration of said period of 90 days* to extend the time, did not regard it as in any way material whether the written evidence of such agreement, to wit, the stipulation above referred to, was actually signed before or after February 24th.

XII. That on the same day, to wit, March 2nd, 1920, an order upon said stipulation was made

by District Judge Mayer extending the November term of said court for the purpose of settling and filing the bill of exceptions to and including April 6th, 1920, and duly filed in the office of the clerk of the said District Court, a copy of which is hereto annexed and marked Exhibit A. The defendant did not at any time move to vacate or otherwise affect said order of March 2nd, but, on the contrary, during the month of March, 1920, its attorneys were in correspondence with the plaintiff's attorney in relation to the bill of exceptions, as more fully appears from the affidavits herewith submitted.

XIII. That thereafter, and on April 6th, 1920, Judge Mayer, under an order to show cause dated April 5th, further, by order of April 6th, extended the term for the purpose of settling the bill of exceptions to May 3rd, 1920, but entertained an application made by the defendant's attorneys (purporting to appear specially for that purpose) to vacate the order of April 6th, and, after hearing counsel, sustained the said order of April 6th in an opinion, a true copy of which is hereto annexed and marked Exhibit B.

XIV. That on April 30th, 1920, a further order was made by District Judge Mayer upon notice to the defendant (its counsel again purporting to appear specially for the purpose of opposing the application) further extending the term for the purpose of settling the bill of exceptions to May 25th, 1920.

XV. That petitioner and his attorney, in reliance upon defendant's stipulations, oral and writ-

ten, as aforesaid, and in reliance upon the said order of March 2nd, incurred large obligations and petitioner paid out considerable sums of money in preparing the assignment of errors and bill of exceptions, and that at least $1628.31 of such expenses have been incurred and paid in reliance upon the validity of the said stipulation and of the said order of March 2nd, 1920.

XVI. That on May 11th, 1920, petitioner's bill of exceptions was settled by District Judge Sheppard at Pensacola, Florida, and on May 24th, 1920, the writ of error was allowed by District Judge Knox, the assignment of errors, bill of exceptions and bond were duly filed and the citation issued, all in accordance with the usual practice, and thereafter the transcript of record was duly certified by the Clerk of the District Court on July 23rd, 1920, and thereafter duly filed in the Circuit Court of Appeals. The transcript was thereupon printed under the direction of the Clerk of the Circuit Court of Appeals. Said transcript is 1168 pages in length. The total expenses incurred and paid by petitioner, inclusive of those specified in paragraph XV above in connection with the said writ of error, with travelling expenses to and from Pensacola, and in printing the record, amount to $2078.31, all of which expenses were incurred in reliance upon what petitioner's counsel regarded as a well settled rule of practice and in reliance upon the stipulation and order aforesaid.

XVII. That after said cause had been docketed in the Circuit Court of Appeals, and on March 7th, 1921, the defendant made a motion in the Circuit Court of Appeals on an affidavit for an or-

der to strike from the record the bill of exceptions and to dismiss and quash the writ of error. Said motion was opposed by your petitioner through its counsel, was argued and submitted, and on March 12th, 1921, the Circuit Court of Appeals handed down an opinion, a true copy of which is hereto annexed and marked Exhibit C, wherein it was held that, for the reasons therein set forth, the motion to strike the bill of exceptions from the record should be granted and the motion to dismiss and quash the writ of error denied. No order has been entered in the Circuit Court of Appeals upon said decision and the cause is still upon the docket of said Court and has not yet been argued or otherwise disposed of.

XVIII. Your petitioner further shows that, as advised by counsel, the assignments of error in said cause cannot be presented to said Circuit Court of Appeals and passed upon, save by means of the bill of exceptions, that no reversible error is raised or presented by the writ of error and proceedings had thereon, save by and through the bill of exceptions, and that, in spite of the errors of law of the trial court as assigned, the Circuit Court of Appeals, under the decisions of this court and of the Circuit Courts of Appeals, has no power to review or pass upon such errors without the bill of exceptions.

XX. Your petition further shows that, as petitioner is advised by counsel, if an order were entered by the Circuit Court of Appeals striking out the bill of exceptions, such order would not be subject to review by this court as a matter of right, and your petitioner would be wholly without rem-

edy in the premises and deprived of its day in court, and while the Circuit Court of Appeals might certify questions of law to this court for decision, and thereby request the instructions of this court upon the point of practice involved, yet the granting of that form of relief is wholly discretionary with that court, and cannot be controlled by this court; that, while, after final judgment of affirmance in the Circuit Court of Appeals, this court would have the power to review all the questions of law upon the grant of a writ of certiorari, yet that remedy is discretionary, and it is doubtful if your petitioner could present any of the grounds for granting a writ of certiorari within the rules and principles stated by this court in that behalf; furthermore, that a writ of certiorari from this court to review the final judgment of affirmance would require the whole voluminous record to be brought to this court and require great expense in printing the record; furthermore, that it is doubtful, even if this court should grant a writ of certiorari to review the final judgment, whether any other question would be presented than that involved in this petition, for the reason that in that event the Circuit Court of Appeals would not have passed upon any of the assigned errors of the District Court.

XXI. Your petitioner therefore submits, as advised by counsel, that your petitioner is without remedy in the premises save by virtue of the grant of a writ of mandamus from this court to the Circuit Court of Appeals for the Second Circuit, commanding it to hear your petitioner's cause upon the bill of exceptions and, in the alternative, a writ of prohibition prohibiting the Circuit Court of Appeals from striking your petitioner's bill of excep-

tions from the record, for which writ or writs, and for such other writ or order or relief as your petitioner may be entitled to in the premises, your petitioner prays and further prays for a rule or order staying the proceedings in said Circuit Court of Appeals pending the hearing and determination of this application.

EXPORTERS OF MANUFACTURERS' PRODUCTS, INC.,

By Henry M. Ward,
Its counsel,
522 Fifth Avenue,
New York City.

I hereby certify that in my opinion the foregoing petition is well founded.

HENRY M. WARD,
Counsel for Petitioner.

Exhibit A.

At a stated Term of the United States District Court for the Southern District of New York held at the United States Court House and Post Office Building in the Borough of Manhattan, City of New York on the 2nd day of March, 1920.

Present:
Honorable JULIUS M. MAYER,
District Judge.

EXPORTERS OF MANUFACTURERS' PRODUCTS, INC.,
Plaintiff,
against
BUTTERWORTH-JUDSON COMPANY,
Defendant.
L 18-79.

UPON READING AND FILING the annexed stipulation, dated March 1, 1920, it is

ORDERED that the November Term of this Court, for the purpose of settling and filing the Bill of Exceptions herein, be and the same hereby is extended up to and including April 6th, 1920.

J. M. MAYER,
U. S. D. J.

Exhibit B.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EXPORTERS OF MANUFACTURERS' PRODUCTS, INC.,
Plaintiff,

against

BUTTERWORTH JUDSON COMPANY,
Defendant.

MAYER, *District Judge*.

(1) By an order of this court dated March 2, 1920 it was—

> "Ordered that the November Term of this court, for the purpose of settling and filing the bill of exceptions herein, be and the same hereby is extended up to and including April 6th, 1920."

The present motion is to extend the November Term to May 3, 1920. The action is at law and the judgment was filed November 26, 1919. Under Rule 5 of this court the term expired February 24, 1920. On March 1, 1920 the attorneys for the parties stipulated as follows:

> "IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the November Term of the United States District Court for the Southern District of New York be extended

> to April 6th, 1920 for the purpose of settling and filing the bill of exceptions herein. The defendant, however, reserves the right to object, as not noted in time, to any exception not noted by the plaintiff within the time specified by stipulation between the parties entered into upon the trial of this action."

On the foregoing stipulation, the order supra was made. It is agreed that the reservation in the stipulation has nothing to do with this application. It refers, as stated, to the record upon the trial, and the stipulation entered into upon the trial.

In order that the action of the defendant's attorneys in opposing the motion may be understood, it is fair to state that they reserved the point as to lack of jurisdiction which they are now urging. Mr. Buckley's affidavit sets forth the following (the clerk referred to being Mr. Marshall's clerk):

> "That the attention of the clerk offering said stipulation was called to the fact that the November Term of said court had expired, and that the stipulation, if executed by the attorneys for the defendant could have no effect. The clerk thereupon stated that this stipulation was the only way that he knew to extend the November Term of the court, and that he believed it was the proper practice to pursue. That it was thereafter determined to sign it upon his insistence, although this office took the position that it was of no effect."

The sole question, therefore, is this: Whether the court has power to make an order extending the

term of the court for the purpose of settling and filing a bill of exceptions after the term has expired, and where there is a stipulation consenting to the extension of the term for that purpose, signed by the attorneys for the parties after the term has expired.

The latest discussion in this circuit of an extension of the term question is found in Blisse v. United States, 263 Fed. 961—C. C. A.—decided January 14, 1920. Many cases are there referred to and construed. In addition reference is made by me to Oxford v. Coast Line R. Co. v. Union Bank of Richmond, Va., 153 Fed. 723, 82 C. C. A. 609; Talbot v. Press Pub. Co. (C. C.) 80 Fed. 567; Susquehanna Coal Co. v. Casualty Company of America (D. C.) 247 Fed. 137; Western Dredging & Improvement Co. v. Heldmaier, 116 Fed. 79, 53 C. C. A. 664. United States v. Mayer, 235 U. S. 55, 35 Sup. Ct. 16, 59 L. Ed. 129, which I have carefully read again since the argument, seems to be confined to motions or proceedings designed to set aside or nullify a judgment on grounds having no relation to a bill of exceptions.

I must assume (especially because of the citation in the Blisse case, of E. I. Du Pont de Nemours Co. v. Smith, 249 Fed. 403, 161 C. C. A. 377) that our Circuit Court had all relevant cases in mind when it decided the Blisse Case. Judge Rogers in that case, reading for the court states:

> "We see no sufficient reason to hold that a bill cannot be signed by a judge after the term has expired, provided the parties consent and that *such consent may be given even after the term has expired.*" (Italics mine.)

(2) This is a definite and unequivocal statement of a rule. It is contended that the part italicized is dictum; but it must be remembered that, when dealing with questions of practice, as distinguished from questions of substantive law, appellate courts not infrequently take the opportunity of stating a rule for the guidance of courts of first instance and of the bar. The question under consideration is thus precisely covered by the opinion in the Blisse case, and the order made by me on April 6th, 1920 will stand.

Motion granted.

Exhibit C.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

Before:

Hon. HENRY GALBRAITH WARD
Hon. CHARLES MERRILL HOUGH
Hon. MARTIN T. MANTON
Circuit Judges.

EXPORTERS OF MANUFACTURERS' PRODUCTS, INC.,
Plaintiff-in-Error,

against

BUTTERWORTH-JUDSON COMPANY,
Defendant-in-Error.

Motions by defendant-in-error for an order (a) striking from the record the bill of exceptions herein, and (b) dismissing and quashing the writ of error.

In an action at law in the District Court for the Southern District of New York, Butterworth Company recovered verdict and judgment against plaintiff-in-error. Thereupon this writ was taken.

The Stated Terms of the trial court begin each month on the first Tuesday thereof (Jud. Code 97), but by a general rule of that court it is provided that

> "For the purpose of taking any action which must *be taken within the term* of the court at which final judgment or decree is entered, each term of court is extended for ninety days from the date of entry of final judgment or decree."

In respect of this case the ninety day period above provided for, and therefore the term at which final judgment was entered, expired on 24th February, 1920.

On March 1, 1920 the following stipulation was executed between the attorneys for the parties hereto:

> "It is hereby stipulated and agreed by and between the parties hereto that the November Term of the United States District Court for the Southern District of New York be extended to April 6, 1920 for the purpose of settling and filing the bill of exceptions herein."

At the time of signing the above agreement the attorney for defendant-in-error stated to his opponent his opinion that since the term had expired the stipulation "could have no effect."

Before April 6th plaintiff-in-error proposed the bill of exceptions as to which this motion is made. Thereupon the trial judge, over the objection of defendant-in-error and on the faith of the stipulation above quoted, settled and signed the bill of exceptions. The record, including such bill of exceptions, was then filed in this Court and defendant-in-error made this motion.

CHADBOURNE, BABBITT & WALLACE, ROGER B. HULL, of counsel, for defendant-in-error and motion; HARFORD T. MARSHALL, opposed.

HOUGH, *C. J.*

The unusual facts above recited and a decision of the Supreme Court (*O'Connell* v. *United States*, 253 U. S. 142) rendered 17th May, 1920, and therefore after the action of the Court below, compel some review and revision of our judgments on the subject of settlement of bills of exceptions.

The undoubted general rule that a bill of exception must be settled within the term at which the judgment is entered, or within such further time, *i. e.*, extension of term, as may be allowed by order entered before that term's expiration, we stated in *Koewing* v. *Wilder*, 126 Fed., 472, and repeated it in respect of an effort to file a bill *nunc pro tunc* in *Reader* v. *Haggin*, 160 Fed., 909. But the right was reserved of allowing or approving the settlement of a bill after term's expiration under "very extraordinary circumstances" (*United, etc. Co.* v. *Stimson*, 175 Fed., 1023; *Glickstein* v. *United States*, 215 Fed., 90). We have also insisted that where such settlement was made after the end of the term the reason or justification for so doing should affirmatively appear by an express statement thereof (*Ulmer* v. *United States*, 266 Fed., at 181).

Under the extraordinary circumstances which withdrew a given case from the operation of the rule, we have included the illness of the trial Judge (*Roberts* v. *Bennett*, 135 Fed., 748), which of course is a disability within Rev. Stat., Sec. 953 as amended (*Schmidt* v. *Standard etc. Co.*, 202 Fed., 1023), though mere absence from the district is not such disability (*Ulmer* v. *United States, supra*).

Recognition has always been given to the ruling in *Waldron* v. *Waldron*, 156 U. S., 361, that a bill may be settled after the term by virtue of a consent or agreement of parties made during the term; but though no express ruling on the point has ever been made in a reported opinion by this Court, examination of the files will show cases evidencing only consents made after expiration of term and all duly made extensions thereof. And the effect of that practice is reflected in the remark (not necessary for determination of the cause in hand) in *Blisse* v. *United States*, 263 Fed., at 966, viz.: "We see no sufficient reason to hold that the bill cannot be signed by the Judge after the term has expired provided the parties consent and that such consent may be given even after term has expired."

That motions affecting the judgment, such as an application for a new trial, could not even on consent be entertained after the end of the term is a rule plainly enforced in *United States* v. *Mayer*, 235 U. S., 55, because the question is not one of procedure but of power or jurisdiction, and consent cannot give jurisdiction. The settlement of a bill of exceptions, however, has been practically regarded rather as a matter of procedure than otherwise, and therefore within very wide limits subject to the consent or agreement of counsel.

In view, however, of the O'Connell case, *supra*, and of the recent consideration thereof in *Anderson* v. *United States*, 269 Fed., 65 (70), we are constrained to the holding that the settlement of a bill of exceptions is a jurisdictional matter over which neither Courts nor parties have any power or control after the end of the term as lawfully extended either by consent given or order entered before such termination as extended.

It follows that the language quoted from the Blisse case *supra* is erroneous and that of such cases as *DuPont* v. *Smith*, 219 Fed., at 605, must be understood with the limitation that the consent of parties rises no higher, or can effect no other purpose than that of an order extending the term entered before the term's end.

We therefore grant so much of the motion as strikes from the record the bill of exceptions; holding (to quote from the O'Connell case) that the "proceedings concerning settlement of a bill are *coram non judice*." It may be noted that the expression of opinion by counsel on signing stipulation is immaterial.

This may render the present writ hopeless, yet does not technically require granting the second motion. We have pointed out in *Fraud* v. *Empire, etc., Co.*, 259 Fed., 618, that a writ of error is usually accompanied both by a judgment roll and a bill of exceptions. Under the writ we may examine the judgment roll to ascertain its regularity (*Goldfarb* v. *Keener*, 263 Fed., 357); but only through the bill of exceptions can we examine the occurrences at trial (*Bucsel* v. *United States*, 258 Fed., at 816).

As by this motion we are not called upon to investigate the judgment roll, the application to dismiss the writ of error is denied.

If, however (as in all probability is the case) the writ is idle without the bill of exceptions, the plaintiff-in-error may take dismissal, if so advised, without costs.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. Original

Ex parte

EXPORTERS OF MANUFACTURERS' PRODUCTS, INC.,

Petitioner.

On petition for writ of mandamus and/or writ of prohibition to the Circuit Court of Appeals for the Second Circuit.

CITY, COUNTY & STATE OF NEW YORK, ss.:

HARFORD T. MARSHALL, being duly sworn, deposes and says:

I am a member of the bar of the State of New York of upwards of twenty years' standing and a member of the bar of the District Court for the Southern District of New York and of the Circuit Court of Appeals for the Second Circuit, and attorney of record for the petitioner in the case in said courts referred to in the petition.

I have read the petition and have personal knowledge of the facts therein stated. I have been attorney of record for the petitioner since the action at law referred to was begun and participated in the trial and had charge of the preparation of the bill of exceptions and all other proceedings in relation to the writ of error herein.

I attended in person before District Judge William B. Sheppard at Pensacola, Florida, on May 11th, 1920, upon the settlement of the bill of exceptions and prepared and argued the motions in the District Court and in the Circuit Court of Appeals referred to in the petition.

All the statements in the petition are true of my own knowledge. Supplementing the facts stated in the petition, I further state the following as true of my own knowledge:

During the month of January, 1920, and prior to February 24th, 1920, which is the date of the expiration of the period of 90 days from the date of the entry of judgment, November 26th, 1920, under Rule 5 of the District Court for the Southern District of New York, and during that period of said extension I had several conversations by telephone with Mr. Wallace, a member of the firm of Chadbourne, Babbit & Wallace, attorneys for the defendant Butterworth-Judson Company herein, and with Mr. Callan associated with said firm. I cannot recall the exact words used in these conversations, but do recall the substance clearly and distinctly. The substance of these conversations was that an extension of the term for the purpose of settling and filing the bill of exceptions beyond the 90 days would be needed by the petitioner herein on account of the size and condition of the record of the trial and on account of the absence of Judge Sheppard from this district in Pensacola in the State of Florida. I wrote to Mr. Wallace on January 6th, 1920, as follows:

"January 6, 1920.

William Wallace, Jr., Esq.,
14 Wall Street,
New York City.

My dear Mr. Wallace:

I am preparing the Assignments of Error in the case of Exporters against the Butterworth Judson Company.

The record is somewhat confused and I would like very much to go over the record with you very briefly and see if we cannot straighten it out; of course, in your office at your convenience.

Yours very truly,

HARFORD T. MARSHALL."

About this time, and within a few days subsequent to January 6th, 1920, Mr. Wallace and Mr. Callan agreed orally to give me such reasonable extension of time as might be needed for the purpose above stated. Between January 6th and January 16th I conferred with them on several occasions at their office, No. 60 Wall Street, New York City, in regard to certain exceptions appearing in the stenographer's minutes of the trial and during these interviews they again orally agreed to give me such reasonable further time as might be necessary for the purpose of settling the bill of exceptions, and the question of further time was not further discussed. They wrote to me on January 16th as follows:

"January 16, 1920.

Exporters of Manufacturers' Products, Inc.

vs.

Butterworth-Judson Company.

Harford T. Marshall, Esq.,
2 Rector Street,
New York, N. Y.

Dear Sir:

In respect to your proposal to supplement the record in the above entitled action, by adding exceptions to certain parts of the Court's charge or refusal to charge, we wish to say that we have given the same our very careful consideration. The stenographer's transcript of proceedings at the trial correctly discloses on pages 850-1-2 all that transpired with respect to written requests for charges submitted by each party. In fact, those requests were never specially read to the jury.

The transcript (page 852) also discloses the following arrangement with respect to the noting of exceptions thereto:

> 'Mr. Marshall: Then it may be understood that each side may have 24 hours or something like that in which to note exceptions?
>
> The Court: Yes.
>
> Mr. Wallace: That would be agreeable to us.'

We think the actual proceedings as disclosed in the transcript should be incorporated in any record to be made, but in view of the foregoing stipulation, which we entered into upon the trial, at your suggestion, we must object to any exceptions because none were noted within the time specified in the said stipulation, and we shall be compelled to reserve such an objection in connection with any step taken by us by way of participating in the preparation of a record in this case.

Very truly yours,

CHADBOURNE, BABBIT & WALLACE."

On January 31st, 1920, I wrote to Judge Sheppard at Pensacola as follows:

"January 31, 1920.

Honorable W. B. Sheppard,
Judge, U. S. District Court,
Pensacola, Florida.

Dear Sir:

In preparing our Assignment of Errors for the review of the case of Exporters of Manufacturers' Products, Inc., against Butterworth-Judson Company, tried before you in the District Court in New York last October, we have been unable to agree with the defendant's attorneys with respect to certain exceptions which we claim to instructions to the jury given and refused by you.

After the conclusion of your main charge you called the attention of all the counsel to

the written requests for instructions which had been handed to you, and it was then agreed that instead of reading them one by one you would mark upon the requests themselves whether they were given or refused, and give each side an exception to his opponent's requests charged and to his own requests refused. This clearly appears at page 851 of the record, where the immediate reference was to the defendant's requests. You had just said that you had covered some of the requests, but not quite as fully as requested, because you did not have the time. Mr. Marshall then said 'If your Honor will mark those refused and give Mr. Stanchfield an exception and those which are charged and give me an exception.' Mr. Rand then said 'The same as to both sides.' It is true that Mr. Marshall then said, page 852, that each side was to have twenty-four hours 'or something like that' in which to note exceptions. In point of fact, however, your notations upon the requests to charge were never available to either side until some weeks after the trial. When we finally saw them we found that you had in many cases marked our requests 'given,' but these requests were never, in point of fact, given, because they were not read to the jury except as they may have been incorporated in your general charge.

We insist, therefore, that in our assignments of error, you have allowed us an exception (a) to each request of ours which you refused, (b) to each request of ours which you did not read to the jury even though you have it noted as given. We are confident that it was your in-

tention to allow each side to note an exception as above indicated. In order to refresh your recollection we are enclosing the pertinent pages of the minutes covering this matter. The enclosure is our original copy of the minutes and we ask that you kindly return them with your decision.

Yours Respectfully,

HARFORD T. MARSHALL."

I received a reply from him dated February 4th, 1920, as follows:

"February 4, 1920.

Harford Toland Marshall, Esq.,
2 Rector Street,
New York, N. Y.

Dear Sir:

Replying to your letter of the 31st ult., enclosing copy of Minutes in the trial of Exporters of Manufacturers' Products, Inc., against Butterworth-Judson Company, I would state that my memory is refreshed on the subject, and it accords with the stenographer's report, generally, and likely as not, some of the Requests were marked "Given," but were not in fact read, but some of them may have been read, and if so the Minutes should indicate it. I expected Counsel on both sides to present the requested Instructions the following day, and remained in the Office until 12 o'clock, but no one appeared, except Mr. Rand,

who called to ascertain if the jury had reported a verdict.

When you submit the Bill of Exceptions for settlement, you had better notify opposing counsel your purpose to ask the Court to note the exceptions on these requests.

Yours very truly,

WM. B. SHEPPARD."

The stenographer's minutes were very voluminous, consisting of 860 typewritten pages. There were 57 documentary exhibits, 28 of which were in the custody of the defendant's attorneys and many of which it was necessary to reproduce by photography. The defendant's attorneys were informed by me immediately after the termination of the trial that it was the intention of the plaintiff-in-error to review the judgment by writ of error from the United States Circuit Court of Appeals for the Second Circuit. The question of stipulating an extension of the term for the purpose of filing the bill of exceptions was discussed at the conferences above referred to, understood and agreed to orally, and about this time, that is, about the end of January or beginning of February, 1920, I instructed my managing clerk, Lewis Bassian, whose affidavit is herewith submitted, to prepare a written stipulation and have it signed by the attorneys for the defendant, but stated no time in which he was to do this, as I considered that it was his duty to obtain the extension within the proper time.

On March 1st, 1920, as appears in the affidavit of said Lewis Bassian, herewith submitted, he presented a stipulation extending the time in which to file a bill of exceptions to April 6th, 1920, to the

attorneys for the defendant. It was retained by them and another stipulation prepared by them, signed and delivered to him upon the following day, March 2nd, 1920, upon which, without any objection upon the part of the defendant's attorneys, an order was signed and filed by Judge Mayer.

On March 11th, 1920, I wrote to Mr. Wallace as follows:

"March 11, 1920.

Exporters v. *Butterworth Judson.*

Chadbourne, Babbit & Wallace, Esqs.,
14 Wall Street,
New York City.

My dear Mr. Wallace:

I am about to send the Bill of Exceptions to Judge Sheppard in Pensacola for settlement. Of our exhibits you have Nos.:

6. Letter of May 7th by the Plaintiff to the Butterworth-Judson Company.
10. Contract No. 414.
11. " " 415.
12. " " F. O. 2039.
13. " " F. O. 2074.
16. Gun cotton contract.
17. Hudson Bay contract.
22. Letter of July 16th.

Will you kindly have Mr. Callan get your exhibits together in addition to these and let me have an opportunity to copy or photograph them.

I hope this can be done at once as I have only till April 6th to file the Bill of Exceptions.

Yours very truly,

HARFORD T. MARSHALL."

A few days later the defendant's attorneys sent me copies of the exhibits requested for insertion in the bill of exceptions.

On March 29th, 1920, I wrote Judge Sheppard as follows:

"March 29, 1920.

Exporters of Manufacturers' Products, Inc.,

against

Butterworth-Judson Company.

Honorable W. B. Sheppard,
U. S. District Judge,
Northern District of Florida,
Pensacola, Florida.

Dear Sir:

I am sending today by parcels post the Bill of Exceptions in the above entitled matter for settlement, and I also enclose copy of letter sent to the opposing counsel, together with copy of my letter to you of January 31, 1920 and your reply of February 4, 1920.

The stenographer's minutes I believe to be correct as to just what occurred upon the trial. The plaintiff's requests to charge, however, were incorporated in the minutes after the ver-

dict and none of them, in fact, were read to the jury in the language requested or in any form at all, except in so far as your Honor may have incorporated the substance of them in your main charge.

Under the circumstances, we feel that you should give us an exception to each and every charge requested, as, under any circumstances, they were not read to the jury in the language requested. The opposing counsel will doubtless communicate with you upon this point.

Yours very respectfully,

HARFORD T. MARSHALL."

and on the same day sent to him at Pensacola the bill of exceptions and wrote to the attorneys for the defendant, enclosing a copy of my letter to Judge Sheppard, as follows:

"March 29, 1920.

Exporters of Manufacturers' Products, Inc.,

against

Butterworth-Judson Company.

Chadbourne, Babbit & Wallace, Esqs.,
14 Wall Street,
New York City.

Dear Sirs:

I enclose herewith copy of letter to Judge Sheppard in the above entitled matter. I also enclose copy of my letter to him of January 31, 1920 and his reply of February 4, 1920 in

order that you may communicate with him upon the settlement of the Bill of Exceptions.

Yours very truly,

HARFORD T. MARSHALL."

On April 3rd, 1920, I received from the attorneys of the defendant a letter enclosing copies of two letters sent to Judge Sheppard. They read respectively:

"April 3, 1920.

Harford T. Marshall, Esq.,
2 Rector Street,
New York, N. Y.

Dear Sir:

We beg to hand you herewith copy of our letters of April 1st and 2nd to Judge Sheppard in connection with the bill of exceptions in the case of Exporters of Manufacturers' Products, Inc., v. Butterworth-Judson Company.

Very truly yours,

CRAWFORD, BURKE & WALLACE"

"April 1, 1920.

"UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

Exporters of Manufacturers' Products, Inc.,

against

Butterworth-Judson Company.

Hon. W. B. Sheppard,
United States District Judge,
Northern District of Florida,
Pensacola, Florida.

Dear Sir:

Referring to the letter to you, dated March 29th, of Harford T. Marshall, Esq., attorney for the plaintiff, respecting the settlement of the bill of exceptions in the above entitled case.

The stenographer's transcript of the proceedings of the trial shows on pages 850 to 852, what transpired with respect to the written requests for charges submitted by each party and to the noting of exceptions to the action of the court in connection therewith.

The transcript discloses the following arrangement with respect to the noting of exceptions to the court's action in connection with the written requests:

"Mr. Marshall. Then it may be understood that each side may have 24 hours or something like that in which to note exceptions?

"The Court. Yes.

"Mr. Wallace. That would be agreeable to us."

This stipulation, it will be noted, was made at plaintiff's request. The proceedings, as shown by the transcript, should of course be incorporated in the bill of exceptions, but we cannot for the defendant consent at this time to the notation of exceptions which were not properly taken.

The plaintiff failed to avail itself of the opportunity afforded by the stipulation, made at its suggestion, to note exceptions within the time stipulated, and we object to the incorporation in the bill of exceptions or record of any exceptions to rulings of this court not taken during the progress of the trial or within the time stipulated.

If your Honor decides to give to the plaintiff at this time the exceptions which it requests in its letter of March 29, 1920, and allows the same to be incorporated in the bill of exceptions, we, on behalf of the defendant, desire that our objection to the allowance of such exceptions be noted in the bill of exceptions or record in the following language:

> 'The defendant, Butterworth-Judson Company, objects upon the settlement of the bill of exceptions to the incorporation therein of any notation showing that plaintiff took any exceptions to the failure of the court to read or make to the jury the requests to charge submitted by the plaintiff; the plaintiff having failed to make known its exceptions during the progress of the trial or within the time stipulated by the parties. The defendant further objects to the incorporation at this time in the bill of exceptions of

any such notation, or of any other notation of exceptions which were not taken at the trial, or other matter which does not correctly show the proceedings thereat. The defendant has urged and preserved this objection in every state of the settlement of this bill of exceptions.'

Yours very respectfully,

CHADBOURNE, BABBIT & WALLACE."

"April 2, 1920.

Honorable William B. Sheppard,
United States District Judge,
Northern District of Florida,
Pensacola, Florida.

Dear Sir:

We confirm telegram sent to you today as follows:

'Respecting the case of Exporters of Manufacturers' Products against Butterworth Judson Company (stop) We object to signing of any bill of exceptions for the following reasons (stop) Terms of court at which judgment was entered has expired (stop) During term no order of court was made or consent of parties given permitting the signing of bill after expiration of Term stop We also repeat and reserve objections set forth in our letter of first instant now as always reserving general objeections to settlemeat of any bill (stop) Plaintiff has failed to furnish us with copy of proposed bill of exceptions submitted to you and has

also failed to serve us with formal notice of such settlement (stop) Therefore we have had no opportunity to examine the proposed bill or to submit or propose objections thereto (stop) Letter follows.'

We desire to note our objections to the signing of any bill of exceptions since the Term of court at which the judgment was entered has expired. Under Rule V of the General Rules of the District Court for the Southern District of New York each term is extended for 90 days from the date of entry of final judgment for the purpose of taking any action which must be taken within the term of the court at which the judgment was entered. The judgment was entered in this case November 26, 1919, and the 90 days expired February 24, 1920. The cases hold that bills of exceptions cannot be signed after the expiration of the term at which the judgment was rendered unless there is an express order of court made during the term or the parties during the term given their consent to the signing of the bill after the expiration of the term. See *Waldron* v. *Waldron*, 156 U. S. 360, at page 378; also *Jones* v. *Grover & Baker Sewing Machine Co.*, 97 U. S. 24 L. E. p. 925. On March 1, 1920, after the expiration of the term as extended by the rule, we did sign a stipulation extending the term to April 6, 1920, for the purpose of settling and filing the bill. The stipulation reads as follows:

'IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the No-

vember Term of the United States District Court for the Southern District of New York be extended to April 6th, 1920 for the purpose of settling and filing the Bill of Exceptions herein. The defendant, however, reserves the right to object, as not noted in time, to any exceptions not noted by plaintiff within the time specified by stipulation between the parties entered into upon the trial of this action.'

Under the decisions above mentioned, this stipulation is without effect and we desire to reserve all objections to the consideration or signing of a bill of exceptions at this time.

Without prejudice to the foregoing objections: The plaintiff has failed to serve us with a notice in accordance with the practice here of the settlement of the proposed bill of exceptions, nor has the plaintiff served us with a copy of the bill submitted to you for settlement. Hence we have had no opportunity to examine the document presented to you for signing to ascertain whether it is correct, or to present objections thereto. Mr. Marshall tells us that it is a copy of the Stenographer's minutes. But we cannot waive the right to examine the same before its execution by you to ascertain whether it conforms with the minutes.

We further reserve in addition to the objections above set forth, the objections presented in our letter to you of the first instant.

Yours respectfully,

CHADBOURNE, BABBIT & WALLACE."

The letter of April 2nd, 1920, was the first time any intimation was given of their intention to repudiate their stipulation of March 2nd, and to raise the technical question of practice therein set forth. There was only one copy of the stenographer's minutes of the trial in existence, as appears from the letter of April 17th, 1920, from the attorneys for the defendant, which reads as follows:

"April 17, 1920.

Harford T. Marshall, Esq.,
2 Rector Street,
New York City.

Dear Sir:

We beg to hand you herewith stenographer's minutes in the case of Exporters of Manufacturers' Products, Inc. vs. Butterworth-Judson Company, covering proceedings from October 14, 1919 to the end of the trial inclusive. We find that we have not in our possession the minutes of the proceedings prior to October 14. What we have is merely an excised copy of the minutes covering the first part of the trial made by stenographers in our own office. The copy omits arguments of counsel and other material which were not considered important for our purposes when the copy was made. It is in this first part that the pencilled references and cross-references appear, to which we referred this morning.

We will, of course, expect you to return to us the minutes which we are sending to you herewith after they have served your purpose.

Yours very truly,

CHADBOURNE, BABBIT & WALLACE."

No word was received from Judge Sheppard in answer to the letter of March 29th under April 10th, when I received the following telegram:

"Harford Toland Marshall

Atty at law 2 Rector St New York NY

Bill of exceptions received and filed April 6th but objections filed by Wallace to noting exceptions to the refusal to give requested instructions because not presented within twenty four hours from date of stipulation period objections also made to my signing bill because same was not submitted to adverse counsel with notice of application to judge period rules require notice and copy of exceptions period further objection is made that bill of exceptions was not presented during the term of court period think stipulation until April sixth would waive this omission but notice should have been given and exceptions to requested charges is probably too late period have you any stipulation waiving notice and copy of bill period answer Miami Florida

JUDGE SHEPPARD."

Not hearing from Judge Sheppard by April 6th, the term was further extended by motion and order to May 3rd, 1920, and on April 29th, 1920, the term was further extended to the 25th day of May by motion and order. In the meantime, it was necessary to wire to Judge Sheppard to return the bill of exceptions as appears from telegram sent by me to Judge Sheppard on April 14th, 1920, and which reads as follows:

"W. B. Sheppard,
U. S. District Judge,
Pensacola, Florida.

Term extended by order to May third suggest you send bill of exceptions back to me will have help of opposing counsel to submit same to you in better form in time to file by May third answer collect.

HARFORD T. MARSHALL
Rector Street."

No answer being received to that, your deponent wired Judge Sheppard at Miami, Florida, on April 17th, as follows:

"W. B. Sheppard,
U. S. District Judge,
Miami, Florida.

Wired you Pensacola April fourteenth term extended by order to May third suggest you send bill of exceptions back to me will have help of opposing counsel to submit same to you in better form in time to file by May third answer collect

HARFORD T. MARSHALL
Rector Street."

All these proceedings were discussed with and understood by the attorneys for the defendant. On April 19th, 1920, I received a telegram sent by

Judge Sheppard from Tallahassee, which reads as follows:

"Harford T. Marshall
Atty at law 2 Rector St New York NY

Bill of exceptions forwarded to you today by express per request

JUDGE SHEPPARD,"

and another telegram the same day sent by him from Miami, which reads as follows:

"H T Marshall
2 Rector St New York NY

Telegrams received bill exceptions forwarded by express Monday returning to Pensacola first

JUDGE SHEPPARD."

To make certain that Judge Sheppard would be in Pensacola on May 11th, I wired to him on May 6th as follows:

"W. B. Sheppard
U. S. District Judge
Pensacola Florida

Settlement bill of exceptions exporters Butterworth Judson came before you May eleventh at Pensacola kindly answer collect immediately if you will be there

HARFORD T. MARSHALL,"

and received a reply the same day as follows:

"Harford T. Marshall
Atty at law 2 Rector NY

Will be in Pensacola May eleventh and until June

WM B. SHEPPARD Judge."

On May 11th I met Mr. Callan of the defendant's attorneys at Pensacola, who appeared before Judge Sheppard on the settlement of the bill.

On March 7th, 1921, defendant made a motion in the United States Circuit Court of Appeals for the Second Circuit to strike the bill of exceptions from the record and to dismiss and quash the writ of error. This motion was granted and an opinion therein was written by Chief Justice Hough, but upon which no order has been entered. The cause is now upon the docket of the United States Circuit Court of Appeals, but has been adjourned pending this petition.

The writ of error was filed within six months after the entry of judgment, namely on May 24th, 1921. The bill of exceptions was filed May 14, 1921.

I considered, during this entire period, that the matter of the signing and filing of the bill of exceptions was an intermediate matter of practice, which under the extraordinary circumstances presented in this case could be arranged between counsel, as it was arranged, and that I was justified in relying on their stipulation.

I had in mind the rule as laid down in the Blisse case, 263 Fed., 961, and the cases therein cited; and also considered that the time for settling a bill of exceptions was regulated by the rules of the

United States District Court and not by any legislative enactment or rule of any higher court and that if the writ of error was filed in due course until that time the court and attorneys had power by stipulation and order to extend and control the time for settling the bill of exceptions.

HARFORD T. MARSHALL.

Sworn to before me this
30th day of April, 1921.

JOSEPH B. DUBREUIL,
Notary Public,
Westchester County.
Certificate filed in New York County.
New York Co. Clerk's No. 263.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. Original

Ex parte

EXPORTERS OF MANUFACTURERS' PRODUCTS, INC.,

Petitioner.

On petition for writ of mandamus and/or writ of prohibition to the Circuit Court of Appeals for the Second Circuit.

CITY, COUNTY & STATE OF NEW YORK, ss.:

LEWIS BASSIAN, being duly sworn, deposes and says:

I reside at 2211 Second Avenue, New York City.

At all the times hereinafter mentioned I was and now am managing clerk in the office of Harford T. Marshall, the attorney for the plaintiff herein.

Prior to February 24th, 1920, I was informed by said Harford T. Marshall that the attorneys for the defendant would give any necessary extensions of time to perfect the appeal.

Through inadvertence the stipulation extending the term for settling and filing the bill of exceptions herein was not reduced to writing until March 1st, 1920. On that date I wrote out a stipulation as follows:

> "IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the November

Term of the United States District Court for the Southern District of New York be extended to April 6th, 1920, for the purpose of settling and filing the Bill of Exceptions herein,"

which I presented at the office of Chadbourne, Babbit & Wallace, the attorneys for the defendant herein, for signature on that day.

I was requested by them to leave said stipulation at their office till the following day, March 2nd, 1920, for consideration, which I did. On the following day I was informed that said stipulation had been redrafted in form satisfactory to the attorneys for the defendant and would be signed. I immediately called at the office of the attorneys for the defendant and there saw and spoke to Mr. Callan and Mr. Buckley, of Chadbourne, Babbit & Wallace, attorneys for the defendant. Mr. Callan had before him a stipulation which had been prepared and written in their office, and which read as follows:

"IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the November Term of the United States District Court for the Southern District of New York be extended to April 6th, 1920 for the purpose of settling and filing the Bill of Exceptions herein. The defendant, however, reserves the right to object, as not noted in time, to any exceptions not noted by the plaintiff within the time specified by stipulation between the parties entered into upon the trial of this action.

Dated, New York, March 1, 1920."

Mr. Callan asked me why such written stipulation was necessary and I stated that it was for the purpose of extending the term of the District Court for the Southern District of New York for the purpose of settling and filing the bill of exceptions herein, and thereupon I asked for and procured a Bender's Diary in said office containing the rules of the District Court for the Southern District of New York and called the attention of Mr. Callan and Mr. Buckley, of said attorneys for the defendant, to Rule 5 of said court, and stated that the purpose of said stipulation was to further extend the period of 90 days provided in Rule 5 of said court.

No question as to the power of the judge to sign an order upon the written stipulation extending the term was mentioned to me, or in my presence or hearing. Whereupon said stipulation was signed with the firm name of the attorneys for the defendant, "Chadbourne, Babbit & Wallace," by Mr. Harold A. Callan, and delivered to me and a duplicate signed by me in the name of Harford T. Marshall was left with them.

Mr. Callan had asked me if an order was necessary on the stipulation and if I intended to enter one. I stated that I did not know if an order was necessary, but would enter one if it was.

I returned to the office of plaintiff's attorney and wrote out the order, copy of which is hereto annexed and marked Exhibit A.

Said order, with the stipulation annexed thereto, was brought to District Judge Mayer on the same day, March 2nd, 1920, and he signed said order, which was thereafter filed on that day in the office

of the Clerk of the United States District Court for the Southern District of New York.

LEWIS BASSIAN.

Sworn to before me this
30th day of April, 1921.

JOSEPH B. DUBREUIL,
Notary Public,
Westchester County.
Certificate filed in New York County.
New York Co. Clerk's No. 263.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. Original

Ex parte

EXPORTERS OF MANUFACTURERS' PRODUCTS, INC.,

Petitioner.

On petition for writ of mandamus, and/or writ of prohibition, to the Circuit Court of Appeals for the Second Circuit.

CITY, COUNTY & STATE OF NEW YORK, ss.:

HARRY CAHANE, being duly sworn, deposes and says:

That he is an officer, to wit, treasurer of Exporters of Manufacturers' Products, Inc., the petitioner above named;

That he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true;

That the reason why this affidavit is not made by the petitioner is that the petitioner is a corporation.

HARRY CAHANE.

Sworn to before me this
30th day of April, 1921.

JOSEPH B. DUBREUIL,
Notary Public,
Westchester County.
Certificate filed in New York County.
New York Co. Clerk's No. 263.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. Original.

Ex parte:

EXPORTERS OF MANUFACTURERS' PRODUCTS, INC.

On petition for writ of mandamus and for writ of prohibition to the Circuit Court of Appeals for the Second Circuit.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE THE PETITION.

The petition and supporting affidavits show that the petitioner, a New York corporation, in 1918 brought an action at law on contract in the District Court of the United States for the Southern District of New York against Butterworth Judson Company, a New Jersey corporation, to recover a large sum claimed to be due as commissions upon certain sales of acid to the French Government.

The action was tried before a jury in October, 1919, District Judge Sheppard, from the Northern District of Florida, presiding by assignment. The issues of fact were submitted to the jury and a

general verdict rendered for the defendant. Judgment was entered on November 26, 1919, dismissing the complaint on the merits, and the defendant's attorneys were informed that the plaintiff intended to review the assigned errors of the Trial Court by writ of error from the Circuit Court of Appeals for the Second Circuit. Plaintiff's attorney thereupon ordered the stenographer's minutes in order to prepare his bill of exceptions. There were some 860 pages of minutes and numerous exhibits. Judge Sheppard had gone back to Florida, where he remained.

Rule 5 of the District Court provides:

> "For the purpose of taking any action which must be taken during the term of court at which final judgment or decree is entered, such term of court is extended for ninety days from the date of entry of the final judgment or order."

This period of ninety days from November 26, 1919, expired February 24, 1920. In the meantime during January and February Mr. Marshall by telephone and at conferences had at the office of the defendant's attorneys, Messrs. Chadbourne, Babbit & Wallace, of New York City, informed them that he would need an extension of time for the settlement of the bill of exceptions, because Judge Sheppard was in Florida and because he was so busy with other matters that he had not time to complete the bill, which extension the defendant's attorneys, orally, at these conferences, all had prior to February 24th, agreed to give.

Mr. Marshall instructed his clerk, Mr. Bassian, early in February to obtain a written stipulation

accordingly. The clerk overlooked it until March 1st, when he prepared a stipulation extending the time until April 6th, and on the same day, March 1st, presented to the defendant's attorneys for signature. They retained it overnight and informed him the next day that they would sign it. He called on them that day, March 2nd, they showed him the stipulation which they had written with a reservation of certain questions as to exceptions taken at the trial, but with no other reservation. The stipulation so amended was signed by the attorneys for the parties and an order entered thereon in the District Court on the same day. The stipulation reads as follows:

> "IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the November Term of the United States District Court for the Southern District of New York be extended to April 6th, 1920, for the purpose of settling and filing the Bill of Exceptions herein. The defendant, however, reserves the right to object, as not noted in time, to any exceptions not noted by the plaintiff within the time specified by stipulation between the parties entered into upon the trial of this action.
>
> Dated, New York, March 1, 1920.
>
> HARFORD T. MARSHALL,
> Attorney for Plaintiff.
> CHADBOURNE, BABBIT & WALLACE,
> Attorneys for Defendant."

Mr. Marshall then had correspondence during the month of March with defendant's attorneys and with Judge Sheppard relative to the settlement of the bill, and no question as to the validity of the

stipulation was raised until April 2nd, when defendant's attorneys brought the matter to Judge Sheppard's attention by telegram and letter.

By subsequent orders of April 6th and April 30th, defendant's attorneys [illegible] the term was further extended, for the purpose of settling the bill. The bill of exceptions was settled by Judge Sheppard at Pensacola, Florida, on May 11th, and on May 24th, within six months from the date of the judgment, the writ of error was allowed and the cause transferred to the Circuit Court of Appeals in accordance with the usual practice. The transcript of record and bill of exceptions were printed and the cause regularly placed on the docket.

Plaintiff in reliance upon the stipulation and the settled practice and rulings of the Appellate Court, that a stipulation made after the expiration of the term, or its extension, was valid and enforceable, expended over $2,000 in stenographer's fees, printing the record, trip to Florida and other usual expenses.

In March, 1921, defendant's attorneys wholly disregarding their stipulation made a motion in the Circuit Court of Appeals to strike out the bill of exceptions. The motion was granted, the case of *Blisse* v. *United States*, decided by the same Court in January, 1921, overruled on this point and the settled practice in the Circuit Court of Appeals for the Second Circuit followed for many years upset.

In its opinion (Exhibit C, to Petition, p. 18) the Court of Appeals held that the order of Judge Mayer entered on the stipulation, extending the term to April 6th, was *coram non judice*, and an absolute nullity, and that the stipulation because

made after February 24th could not give the Court below jurisdiction to grant the order.

Without the bill of exceptions no reversible error is or can be presented. The plaintiff has no remedy save by writ from this Court.

The following questions are involved: (1) Whether attorneys shall be required to live up to their stipulations. (2) Whether the stipulation made orally during the 90-day extension of term and evidenced by the written stipulation dated March 1st was not sufficient to justify the District Court in extending the time accordingly. (3) Whether defendant's attorneys are not estopped by their written stipulation and acquiescence therein for some thirty days in questioning the order. (4) Whether the fact that plaintiff in reliance upon the stipulation and order spent some $2,000 does not operate further to estop the defendant. (5) Whether a District Court of the United States has jurisdiction to enter an order upon a written stipulation dated and presented after the term as extended by its rule, further extending the term for the purpose of settling the bill of exceptions. (6) Whether the order of the District Court so entered upon the stipulation was subject to review in the Circuit Court of Appeals by motion to strike the bill of exceptions from the record.

It is understood that upon a motion for leave to file a petition it is not the proper practice to burden the Court with a long brief. It is, nevertheless, advisable to refer concisely to the points of law involved and the authorities.

It has been shown, and is apparent from the petition, that petitioner, if an order is entered in the Court of Appeals, will be deprived of its day in

court and denied his right of review of the errors assigned and presented by his bill of exceptions.

No other remedy than a writ from this Court is either adequate or available.

Petitioner is following a well-established practice in applying for a writ to compel the Court below to hear the cause upon the bill of exceptions.

The writ has been granted to compel a Circuit Court of Appeals to hear a cause on writ of error which has been improperly dismissed. *Matter of Christensen Engineering Company*, 194 U. S., 458; *In re Merchant's Stock & Grain Company*, 223 U. S., 639.

To compel a District Judge to settle and sign a bill of exceptions. *The Chateaugay Ore & Iron Company, Petitioner*, 128 U. S., 544.

To compel a District Judge to restore a case to the jury docket which he had erroneously transferred to the equity docket. *Ex parte Simons*, 247 U. S., 231.

To compel a Judge to sign a judgment. *Ex parte Bradstreet*, 6 Pet., 774.

Even if the action of the Court below could be reviewed by writ of error, appeal or certiorari, the summary and expeditious practice of a petition for writ of mandamus or prohibition has been approved. *Ex parte Peterson*, 253 U. S., 300, 305, citing *Ex parte Simons, supra.*

The possible alternative to the writ is a review of the whole case by this Court on certiorari after final judgment or the chance that the Circuit Court of Appeals may before judgment certify the question of practice. In the former event, the entire record would have to be brought here, yet the only reviewable question would be that presented now by the petition. As the Circuit Court of Appeals

could not have heard the cause upon the bill of exceptions, it could not be so heard (as is assumed) in the first instance by this Court. There would be, of course, no ground for applying for a writ of certiorari to review the final judgment of the Circuit Court of Appeals, save the very point here presented, namely, the jurisdiction of the District Court to settle and sign a bill of exceptions upon a stipulation which, while made orally during the term (as extended by court rule), was evidenced by a writing dated a few days after this extension had expired. The possible remedy by certification of questions is a mere possibility of obtaining relief and might well require the sending up of the whole voluminous record. Such a mere possibility of obtaining relief is wholly inadequate. It is not to be assumed that the Circuit Court of Appeals is to be compelled by writ to exercise their discretion with respect to certifying questions.

The decision of the Circuit Court of Appeals (Exhibit C annexed to Petition) is wholly at variance with the established practice, with the decisions of this Court and with its own decisions.

In *Blisse* v. *United States,* 263 Fed., at 966, the rule of practice was stated by the same Court to be that:

> "Consent may be given after the term has expired."

It further appears (Opinion of Circuit Court of Appeals, Exhibit C, p. 18) that:

> "An examination of the files" (of the Circuit Court of Appeals, Second Circuit) "will show cases evidencing *only consents made*

> *after expiration of term* and all duly made extensions thereof."

District Judge Mayer in his opinion pointed out that the practice was well settled both in this Court and in the Circuit Court of Appeals (Exhibit B annexed to Petition, p. 14).

The Circuit Court of Appeals stated that it was "constrained" by the decision of this Court in *O'Connell* v. *United States*, 253 U. S., 142, to hold the stipulation and order entered thereon were *"coram non judice."* In that case, however, the rule of the District Court for the Northern District of California provided that the Court could not extend the term beyond thirty days without the consent of the parties. The United States attorney refused consent in open court and asked the Court to refuse to settle the bill when presented (p. 146). This Court held that *under* these circumstances the power of the Trial Court to settle the bill expired on a date prior to that of the settlement. This Court quotes from (p. 147) *Michigan Insurance Bank* v. *Eldred*, 143 U. S., 293, 298, in which this Court said that the bill of exceptions must be presented to the Judge at the term at which the case is tried

> "or within a further time allowed by order entered at that term, or by standing rule of court *or by consent of parties.*"

It is neither stated nor intimated that this consent is to be given or evidenced or that it must be made by a writing signed within the term or the period of extension fixed by rule of Court. In the case at bar, if the date of the consent is material,

the affidavits show that defendant's attorneys orally agreed to the extension of the term before the 90-day period had elapsed, and that only six days thereafter they entered into a stipulation by which their consent was evidenced. There is nothing in the decision in the *O'Connell* case implying that consent so given is an absolute nullity, and that no order can be entered thereon.

For these reasons it is respectfully asked that leave be granted to file the petition.

May 2, 1921.

HENRY M. WARD,
Counsel for Petitioner.